

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-2347

To be argued by
ROBERT S. HAMMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

ARTHUR S. KURLAN, et al., :

Plaintiffs-Appellants, :

-against- :

HOWARD H. CALLAWAY, Secretary of the :
Army, MALCOLM WILSON, Governor of the :
State of New York and Major-General :
JOHN C. BAKER, Commanding General, :
New York Army National Guard, :

Defendants-Appellees. :

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BRIEF FOR APPELLEES HON. MALCOLM WILSON,
GOVERNOR OF THE STATE OF NEW YORK AND
MAJOR-GENERAL JOHN C. BAKER, CHIEF OF
STAFF TO THE GOVERNOR

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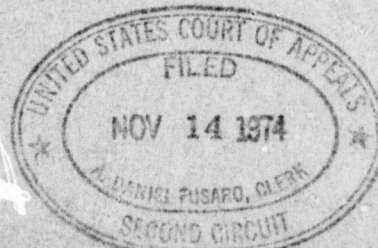


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GOVERNOR OF THE STATE OF NEW YORK AND
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STAFF TO THE GOVERNOR

Questions Presented

1. Were plaintiffs, members of the New York Army National Guard, required to obtain the consent of the Governor of the State of New York, before they might transfer to the Standby Reserve, although otherwise eligible?

2. Did the Governor lawfully deny such consent to plaintiffs and all those similarly situated?

3. Did the District Court have subject matter jurisdiction?

The District Court answered all questions in the affirmative.

Statutes Involved

10 U.S.C. § 269 provides in pertinent part:

(e) Except in time of war or of national emergency declared by Congress, a Reserve who is not on active duty, or who is on active duty for training, shall, upon his request, be transferred to the Standby Reserve for the rest of his term of service, if--

* * *

(2) he served on active duty (other than for training) in the armed forces for an aggregate of less than five years, but satisfactorily participated, as determined by the Secretary concerned, in an accredited training program in the Ready Reserve for a period which, when added to his period of active duty (other than for training), totals at least five years, or such shorter period as the Secretary concerned, with the approval of the Secretary of a military department, may prescribe for satisfactory participation in an accredited training program designated by the Secretary concerned.

This subsection does not apply to a member of the Ready Reserve while his is serving under an agreement to remain in the Ready Reserve for a stated period.

(f) Subject to subsection (g), member in the Ready Reserve may be transferred to the Standby Reserve or, if he is qualified and so requests, to the Retired Reserve, under such regulations as the Secretary concerned, with the approval of the Secretary of Defense in the case of a Secretary of a military department, may prescribe. (Emphasis added)

(g) A member of the Army National Guard of the United States or the Air National Guard of the United States may be transferred to the Standby Reserve only with the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned. (Emphasis added)

Statement of the Case

This is an appeal from a judgment of the United States District Court, Southern District of New York, (Hon. Robert J. Ward, District Judge) entered October 10, 1974, granting summary judgment to defendants Wilson and Baker dismissing the complaint (5a)*.

On March 23, 1970, the President of the United States declared a state of national emergency as a result of an illegal postal workers' strike and directed the Secretary of Defense to call reserves of the armed forces to active duty to assist the Postmaster General in restoring and maintaining postal service and executing the postal laws, Executive Order 11519, 35 Fed. Register 5003. The call-up included, in addition to reserve components organized and maintained under direct federal authority (Naval, Marine Corps, Army and Air Force reserves), members and units of the New York Army and Air National Guard.

* Numbers in parentheses followed by "a" refer to pages of the appendix.

As a result of having performed active duty in what was designated Operation "Graphic Hand," federal reservists were automatically eligible to transfer to the Standby Reserve, relieving them of all training and service obligations except in time of war or national emergency declared by Congress upon completion of five years of service, 10 U.S.C. § 269(e)(2). However, national guardsmen became eligible for such transfer only upon consent of the governor of their state, Id., § 269(g). The reason for this requirement is obvious: a transfer to the Standby Reserve for the remaining one year of a national guardsman's reserve obligation requires his discharge from the National Guard.

Plaintiffs, 205 members of the New York Army National Guard, (15a) claim entitlement to discharge from the Guard and transfer to the Standby Reserve by virtue of their units having been called to active duty during that period. At the time of the call-up plaintiffs were on full-time federal active duty for training for periods of four to six months to which they had been ordered with their consent and the consent of the Governor as part of their obligated training (27a-29a).

On June 10, 1970, former Governor Rockefeller issued Executive Order No. 39, exercising the authority vested in him pursuant to 10 U.S.C. § 269(g) and consented

to the transfer to the Standby Reserve of those members of the New York Army National Guard and New York Air National Guard, otherwise qualified, who apply for such transfer, and who complete five years of satisfactory service from the date of their enlistment and who performed full-time duty in the active military service of the United States pursuant to

the call of the President during the postal strike (66a).

In Mela v. Callaway, ___ F. Supp. ___, 74 Civ. 2153 (RJW) (S.D.N.Y. 1974), an action involving similar issues brought shortly before the instant case, it was the State's contention that Governor Rockefeller's Executive Order No. 39 specifically excluded persons in plaintiffs' position whose normal routines were never disrupted by the order to assist in moving the mails but were already performing full-time active duty for training at federal training bases at the time of the call-up, affidavit of Brig.-Gen. Francis J. Higgins, NYARNG, Vice-Chief of Staff to the Governor, para. 4, et seq. The District Court, ruling on plaintiffs' motion for a preliminary injunction, rejected this contention (18a-19a).

Construing Executive Order 39 to apply to all members of units called up during the postal strike, the Court stated that

If, in fact, the Governor did not intend that his consent extend to those in plaintiffs position, after other reservists similarly situated were given the benefits provided in 10 U.S.C. § 269(e)(2), he could have modified the consent given in Executive Order No. 39. This he did not do (19a).

However, the Court agreed with the State's position that gubernatorial consent was a pre-requisite for transfer to the Standby Reserve (16a-17a). (In their brief, plaintiffs have apparently conceded this latter point, at least for purposes of this appeal.)

As pointed out by General Higgins in his affidavit, supra, para. 10, some 1800 members of the New York Army National Guard assigned to the 42nd Division were performing active duty for training at the time of the postal strike. Under plaintiffs theory of this case and of the Mela case, all would be entitled to early discharge from the Guard and transfer to the Standby Reserve. Such a result would be disastrous for the State of New York. The discharge of these 1800 men, all of whom are past or near the fifth anniversary of their enlistment would bring the New York elements of the 42nd Division below the 80% of authorized strength needed to maintain federal recognition under

National Guard Regulation 10-1, para 9b. A loss of federal recognition would result in a withdrawal of financial, logistical and other support that would gravely impair the units' ability to perform their state mission.

A notice of appeal from the grant of the preliminary injunction was therefore filed on behalf of the State. At the same time, taking the "hint" from the District Court (19a), General Baker requested Governor Wilson to issue a new executive order that would limit the grant of permission to transfer to the Standby Reserve to those whose civilian routines were interrupted by the call to active duty.

On July 10, 1974, Governor Wilson issued Executive Order No. 8, which amended and superseded Governor Rockefeller's Executive Order No. 39; it limited the consent to transfer to the Standby Reserve to members of the Guard, otherwise qualified, who "actually performed full-time duty with their assigned units in the active military service of the United States * * *." It further provided

that nothing contained [therein] shall be construed to authorize or permit the transfer to the standby reserve of any member of the New York Army National Guard or New York Air National Guard who did not actually perform such full time duty with their assigned unit because of their absence from such unit for active duty for training (62a).

The instant action was commenced immediately after the issuance of Executive Order No. 8. Because of the similarity of the issues presented with those in Mela, the District Court and the parties proceeded upon the assumption that Mela was "law of the case." In response to plaintiffs' motion for a preliminary injunction (47a), the State defendants cited Governor Wilson's Executive Order No. 8 (63a) and also, moved for summary judgment. (55a, 59a).*

The motion for summary judgment was granted, the Court holding that the Governor was authorized to decide in his discretion, which national guardsmen, otherwise qualified, might have permission to transfer to the Standby Reserve (9a); that consent previously given might be withdrawn prior to the actual transfer (10a) and that the action by Governor Wilson denying

* At the same time, a motion was made to vacate the preliminary injunction in Mela on the basis of the changed conditions. In a memorandum and order the Court stated that "Inasmuch as the movants have appealed this Court's decision in this case to the United States Court of Appeals for the Second Circuit, their arguments are more appropriately addressed to that Court. Accordingly defendants' motion to vacate the preliminary injunction is denied," Order entered Sept. 23, 1974. Defendants then moved for summary judgment. In the course of discussion between the Court and counsel, it was indicated that the motion would not be entertained while the appeal from the preliminary injunction was pending. While a stipulation withdrawing the appeal was being circulated, the appeal was dismissed for non-prosecution. Counsel, after discussion with the District Court, have stipulated to adjourn the motion for summary judgment in Mela pending the decision of this Court in the instant case.

consent to those who did not actually help move the mails was neither so arbitrary or irrational as to justify the Court's exercise of its "extraordinarily limited" power to review a military decision (11a).

POINT I

PLAINTIFFS ARE INELIGIBLE FOR
TRANSFER FROM THE NEW YORK ARMY
NATIONAL GUARD TO THE STANDBY
RESERVE BY REASON OF THE DENIAL
OF PERMISSION BY THE GOVERNOR.

A.

The National Guard when not in federal service is a state military force, Maryland for the Use of Levin v. United States, 381 U.S. 41, 46 vacated on other grounds, 382 U.S. 159 (1965). While part of the Ready Reserve, it remains at the disposal of the Governor of its home state, protecting the public in time of natural disaster or civil disorder.

Congress has honored the states' interest in maintaining the strength of the National Guard, by unequivocally requiring the consent of the Governor before a national guardsman, otherwise qualified, may be discharged from the Guard and transferred to the Standby Reserve, 10 U.S.C. § 269(g). This clear command by the Congress was recognized by the District Court (8a, 15a-17a) and is not questioned by plaintiffs on this appeal.

The determination as to whether a member of the National Guard is to be discharged prior to the expiration of his enlistment has always been regarded as a matter of military discretion, Anselmo v. Ailes, 344 F. 2d 607, 610 (2d Cir. 1965); Matter of Nistol v. Hausauer, 308 N.Y. 146, 150-151 (1954); Matter of Boling v. Rockefeller, 52 Misc 2d 745, 748 (Sup. Ct. Erie Co. 1962); N.Y. Military Law § 93(1); see also Reid v. United States, 161 Fed. 469, 472 (S.D.N.Y. 1908) app. dis. 211 U.S. 529 (1909). Only recently, the Supreme Court reiterated the rule that courts will not presume to review the exercise of military discretion by the National Guard as well as the Federal armed forces. Gilligan v. Morgan, 413 U.S. 1 (1973); see also: Roth v. Laird, 446 F. 2d 855, 856 (2d Cir. 1971); Feliciano v. Laird, 426 F. 2d 424, 427 (2d Cir. 1970); Smith v. Resor, 406 F. 2d 141, 145 (2d Cir. 1969); Fox v. Brown, 402 F. 2d 837, 840 (2d Cir. 1968); cert. den. 394 U.S. 938 (1969).

B.

A consideration of the facts and circumstances which prompted Governor Wilson's Executive Order shows that the determination and classifications made therein are rationally

based and ought not be disturbed, Gilligan v. Morgan, supra; Roth v. Laird, supra; Feliciano v. Laird, supra; Smith v. Resor, supra; Fox v. Brown, supra and see Almenares v. Wyman, 453 F. 2d 1075, 1082 (2d Cir. 1971); U.S. ex rel. Murray v. Owens, 465 F. 2d 289, 294 (2d Cir. 1972), cert. den. 408 U.S. 1117 (1973); Cf. Hagans v. Lavine, ___ U.S. ___, 42 U.S.L.W. 4381, 4385 (1974). The Governor took into account the fact that those already undergoing their required training at the time of the call-up would be the beneficiaries of a windfall in the form of an early discharge; that this was not warranted since they never were required to interrupt their civilian routines to answer the call of duty. At the same time personnel losses that would result from the early discharge of plaintiffs and those similarly situated would jeopardize federal recognition of plaintiffs' units and the accompanying material support (60a).

It should be emphasized that the State of New York is not attempting to reinterpret the definition of active duty as defined in Title 10, U.S. Code or implementing regulations. What the Governor has done, is to determine which persons who were or active duty in fact, or were deemed to be, by virtue of the activation of their units (whether the proper morning report entries were ever made at the training centers is speculative) are deserving of permission to transfer to the Standby Reserve

pursuant to 10 U.S.C. § 269(g). Thus, cases such as Bell v. United States, 366 U.S. 393, 410 (1961) and Harmon v. Brucker, 355 U.S. 579 (1958) and other authorities cited by plaintiffs, br. pp. 25-35 to the effect that the definitions set out in federal law and regulations must be followed, are inapposite.

The Executive Order of July 10, 1974 revoked any right that plaintiffs might have had to transfer to the standby reserve. Such an order is effective as to any member of the National Guard whose transfer had not been formally carried out at the time. The expiration of a term of enlistment does not automatically end one's military status 10 U.S.C. § 802(a), Messina v. Commanding Officer, 342 F. Supp. 1330, 1333 (S.D. Cal. 1972). In time of war or national emergency a member of the armed forces, regular and reserve alike, is frozen in, "for the duration plus six months", 10 U.S.C. §§ 511(a) and 671a. Unsatisfactory participants in the reserves may also be placed on active duty and held beyond the original termination date of his enlistment, 10 U.S.C. § 673(a); Fox v. Brown, supra.

Defendants do not presume to equate the gravity, of the New York Army National Guard's personnel shortages with the needs of the country in time of war; neither is the question of plaintiffs' current satisfactory participation presented herein. However the principle that supervening events may effect a military man's right to separation from the service, even if formerly eligible for discharge, remains as a viable principle of law. An individual or agency vested with discretion is free to change the manner in which the discretion is exercised. Cf. Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 202-203 (1947); NLRB v. National Container Corp., 211 F. 2d 525, 533-535 (2d Cir. 1954); Kelly v. United States Department of Interior, 339 F. Supp. 1095, 1100 (E.D. Cal. 1972); Fraenkel v. United States, 320 F. Supp. 605, 608 (S.D.N.Y. 1970).

It should also be pointed out that Hornstein v. Laird, 327 F. Supp. 993 (S.D.N.Y. 1971) relied upon by plaintiffs (br. p. 22) is totally inapplicable, since, by its terms only federal reservists as opposed to national guardsmen are affected. Similarly 10 USC § 277 calling for equality of treatment among regulars and reserves applies only to laws applying to both those categories, Winters v. United States, 412 F. 2d 140, 144 (9th Cir. 1969). 10 U.S.C. § 269(g) applies only to the National Guard.

The liability for service of a national guardsman has never been absolutely identical to that of a federal reservist. The most obvious example is active duty pursuant to state call-up, including annual field training performed by a national guardsman (32 USC § 502). This time is not creditable against an active duty obligation pursuant to 10 USC § 673a. A federal reservist could claim credit for his annual two-weeks of active duty, Fox v. Brown, supra, 402 F. 2d at 840.

The needs of the State of New York in maintaining its National Guard at sufficient strength to accomplish its state mission has necessitated the retention of plaintiffs for the full sum of their enlistment. This action was reasonable; based on valid military considerations and ought not to be disturbed.

POINT II

THE DISTRICT COURT LACKED JURIS-
DICTION OVER THIS ACTION.

The Court below based its jurisdiction with respect to the State defendants upon the civil rights law, 42 U.S.C. § 1983, 28 U.S.C. § 1343 and, with respect to the Secretary of the Army, upon its power to issue a writ of mandamus, 28 U.S.C. § 1361 (7a). The same determination had been made in Mela (15a), when the issue had been briefed by both plaintiffs and the State. It is respectfully suggested that the assumption of jurisdiction by the District Court was in error.

While an action under the civil right laws [28 U.S.C. § 1343(3); 42 U.S.C. § 1983] might legitimately touch upon an unwarranted infringement upon the personal life style of a national guardsman, Hough v. Seaman, 357 F. Supp. 1145, 1147 (W.D. No. Car. 1973) (short-haired wig case) this jurisdiction would not extend to a claim relating to his status as such.

Plaintiffs claim may sound in habeas corpus, 28 U.S.C. § 2241, however, there is no showing of any exhaustion of state remedies, 28 U.S.C. § 2254; Preiser v. Rodriguez, 411 U.S. 475 (1973); see also McGee v. United States, 402 U.S. 479, 491 (1971).

Jurisdiction pursuant to 28 U.S.C. § 1343(4) is equally doubtful. Plaintiffs fail to point to any Act of Congress providing for the equal rights of citizens. Nor can they demonstrate that they are being treated differently from any similarly-situated New York National Guardsman in such a way as would deny to them the equal protection of the laws, see Almerares v. Wyman, 453 F. 2d 1075, 1082 (2d Cir. 1971) and Point I, supra.

As the District Court pointed out (7a), even if an action in the nature of mandamus (28 U.S.C. & 1361) were appropriate in cases involving administration of the reserves, as some courts have suggested, e.g. Harris v. Kaine, 352 F. Supp. 769, 772 (S.D.N.Y. 1972) and Garmon v. Warner, 358 F. Supp. 206, 209 (W.D. No Car. 1973) this provision applies only to federal not state officers such as the Governor and his Chief of Staff, General Baker, who, alone, have jurisdiction to discharge a member of the New York National Guard.

None of the other bases of jurisdiction alleged in the complaint (26a) are present:

The plaintiffs allege that they are satisfactorily performing their duties as members of the National Guard, ibid. There is no suggestion that any of them are in imminent danger of being called to extended active duty, by reason of national emergency, 10 U.S.C. § 673(a) or unsatisfactory performance 10 U.S.C. § 673a. Thus, plaintiffs cannot claim to be facing a loss of earnings of \$10,000 or more that has served as a basis of federal question jurisdiction under 28 U.S.C. § 1331(a), Berk v. Laird, 429 F. 2d 302, 306 (2d Cir. 1970); Friedman v. Froehlke, 470 F. 2d 1351-1352 (1st Cir. 1972) and Harris v. Kaine, supra.

Finally, by its terms, an action for a declaratory judgment may not be brought unless there is underlying subject matter jurisdiction in the court, 28 U.S.C. § 2201, Golden v. Zwickler, 394 U.S. 103, 108-110 (1969).

Accordingly we urge an absence of federal subject matter jurisdiction as an alternate ground of affirmance.

CONCLUSION

THE JUDGMENT APPEALED FROM
SHOULD BE AFFIRMED.

Dated: New York, New York
November 14, 1974

Respectfully submitted,
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